

BEFORE THE BOARD OF LABOR APPEALS  
DEPARTMENT OF LABOR AND INDUSTRY  
STATE OF MONTANA

In the matter of the proposed amendment ) NOTICE OF PUBLIC HEARING  
of ARM 24.7.201, 24.7.301, 24.7.303, ) ON PROPOSED AMENDMENT  
24.7.304, 24.7.305, 24.7.306, 24.7.312, ) AND ADOPTION  
24.7.313, 24.7.315, and the proposed )  
adoption of NEW RULE I related to Board )  
of Labor Appeals procedural rules )

TO: All Concerned Persons

1. On July 20, 2007, at 1:00 p.m., the Board of Labor Appeals (board) will hold a public hearing to be held in the first floor conference room (Room 104), the Department of Labor and Industry, Walt Sullivan Building, 1327 Lockey Avenue, Helena, Montana to consider the proposed amendment and adoption of the above-stated rules.

2. The board will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the board no later than 5:00 p.m., on July 13, 2007, to advise us of the nature of the accommodation that you need. Please contact the Office of Legal Services, Department of Labor and Industry, Attn: Marieke M. Beck, P.O. Box 1728, Helena, MT 59624-1728; telephone (406) 444-2917; fax (406) 444-1394; TDD (406) 444-5549; or e-mail mabeck@mt.gov.

3. The rules proposed to be amended provide as follows, stricken material interlined, new material underlined:

24.7.201 ADOPTION OF MODEL RULES (1) ~~Pursuant to the authority vested in the~~ The Board of Labor Appeals of the Department of Labor and Industry, the board adopts by reference the following Model Rules proposed recommended by the Attorney General, namely; ARM 1.3.102 through 1.3.234 (Rules 1-28);

(a) ARM 1.3.102; and

(b) ARM 1.3.203 through 1.3.210.

(2) ARM 1.3.211 through 1.3.225 have not been adopted because the board does not conduct contested case proceedings.

AUTH: 2-4-201, MCA

IMP: 2-4-201, MCA

REASON: There is reasonable necessity to amend ARM 24.7.201 while the Board of Labor Appeals (board) is otherwise amending its procedural rules because it recognizes that the board does not conduct contested cases, and therefore portions of the Attorney General's Model Rules are not applicable to board proceedings.

There is also reasonable necessity to remove archaic and unnecessary language from the rule, while the rule is otherwise being amended.

24.7.301 POLICY (1) The board of labor appeals adopts the following general statement as the policy for the board:

~~(a) The "fair hearing" provisions in Section 303(a)(3) of the Social Security Act requires a reasonable opportunity for workers whose claims are denied to be heard by an impartial tribunal in an adjudicatory proceeding which assures them of elementary fairness. Likewise, Section 39-51-1109 MCA of the Montana Unemployment Compensation Law provides for a fair hearing of a deputy's determination of an employer's contribution liability and rate. The "methods of administration" provision in Section 303(a)(1) requires that procedures for appeals and hearings be reasonably calculated to pay benefits promptly when due. This board recognizes that appeal and hearing procedures take account of the circumstances of unemployed works and the special needs of the program.~~

~~(b) It is the intent of this board insofar as is practical to keep appeal and hearings procedures as simple, speedy, and inexpensive as possible. Simplicity assures that parties may know and understand their rights; it precludes formal and technical procedures which place undue burdens on parties which tend to impair their ability to protect their rights. Speed assures the prompt payment of benefits when due. Low expense means that no individual may be deprived of his rights merely because he cannot afford to retain representation or to incur other expense in the pursuit of these rights.~~

~~(c) Hearings~~ The board hearing on an appeal of a hearing officer's decision board must be fair and such hearings will be conducted in accordance with procedural safeguards. The essential requisites of fairness include but are not limited to the following elements:

~~(i) (a) Timely notice to all claimants of~~ must be provided to interested parties ~~for every material step in the~~ appeal proceedings.

~~(ii) Full opportunity to be heard in respect of all that bears upon the validity, extent, and priority of claims on appeal.~~

~~(iii) (b) That every claimant be availed of the~~ An opportunity for interested parties to present argument and to hear the evidence introduced against him and to know the claims of his an opponent.

~~(iv) To produce evidence and witnesses and to permit the offering of evidence in explanation or rebuttal.~~

~~(v) To permit the cross-examination of witnesses and to make argument.~~

~~(vi) To rely on evidence only which is adequate to support pertinent and necessary findings of fact.~~

~~(c) Interested parties will receive a copy of the board's decision and~~ notification of appeal rights.

~~(vii) (2) That the~~ A decision of the board shall must be based solely on substantial evidence as revealed by the files, records, and any new evidence taken at the appeal hearing to support it.

AUTH: 2-4-201, MCA

IMP: 2-4-201, 39-51-1109, 39-51-2404, 39-51-2407, MCA

REASON: There is reasonable necessity to amend ARM 24.7.301 because the existing rule sets out a policy for contested case proceedings as well as the appeal before the Board of Labor Appeals. The procedural safeguards for an appeal to the board differ because the board is not conducting the contested case proceeding. It is reasonably necessary to amend the rule at this time in order to clarify the role of the board, as the board has noted that parties do not adequately understand the board's functions and duties. In addition, there is reasonable necessity to amend the rule to identify additional statutes that are being implemented by the rule.

24.7.303 DEFINITIONS ~~(1) "Board" means the board of labor appeals, created in Section 2-15-1704 MCA.~~

~~(2) "Referee" means all first appeal authorities, regardless of differences in statutory or state designation.~~

~~(3) "Department" means the department of labor and industry, created in Section 2-15-1701 MCA.~~

~~(4) "Division" means the appeals division of the department of labor and industry, created in Section 2-15-1703 MCA.~~

~~(5)~~ (1) "Administrator" means the administrator of the appeals Unemployment Insurance Division of the Department of Labor and Industry.

~~(6)~~ (2) "Claimant" means an applicant for unemployment compensation insurance benefits.

(3) "Good cause" means reasonably compelling circumstances which did not result from any act or omission on the part of the person claiming good cause and which could not be overcome by reasonable diligence on the part of the person.

(4) "Hearing officer" means the impartial salaried appeal referee designated to hear and decide the disputed claim in a contested case proceeding.

~~(7)~~ (5) "Respondent" means an interested party who contends against an appeal a nonappealing party.

~~(8) "Interested Parties" means:~~

~~(a) The claimant for unemployment benefits.~~

~~(b) The claimant's most recent employing unit.~~

~~(c) The employment units involved in any separation from employment within three (3) weeks or longer at the discretion of the department prior to claimant's claim for eligibility.~~

~~(d) The deputy who made the determination.~~

~~(e) The staff member in the local office who accepted the claim.~~

~~(f) The employment unit whose account may be charged with any benefits paid to claimant.~~

~~(g) Any party other than the foregoing who shall, upon written application to the board, be found by the board to have an interest in the claim or in an appeal arising from the claim.~~

~~(9) "Employer" means any employing unit.~~

AUTH: 2-4-201, MCA

IMP: 2-4-201, 39-51-1109, 39-51-2404, MCA

REASON: There is reasonable necessity to amend ARM 24.7.303 because it contains definitions that are defined in statute. Additionally, the definitions need to be updated to reflect current terminology used by the department. The provisions defining "interested party" have been removed and are now explained in New Rule I. In addition, there is reasonable necessity to amend the rule to identify an additional statute that is being implemented by the rule.

24.7.304 RIGHT TO APPEAL (1) Any interested party dissatisfied with a decision made by a ~~referee~~ hearing officer is entitled to appeal to the board in accordance with the provisions of ~~Section~~ 39-51-2404, MCA.

(2) The address and contact number for the board are as follows:

Board of Labor Appeals

Montana Department of Labor and Industry

1327 Lockey Street

P.O. Box 1728

Helena, MT 59624-1728

Fax: (406) 444-9038

TTY/TTD: (406) 444-0532

Telephone: (406) 444-3311

~~(2) (3) Interested parties appealing to the board from a decision of a referee hearing officer, or from a determination of a contribution liability and classification and rate shall must file with the board within the time provided by law, at either a local office of the department, the board, or the central office of the department, a notice of appeal setting forth the reasons thereon. Appropriate forms for filing such appeals shall be available to claimants and employers at all local offices of the department. The board may accept an appeal made after the time allowed if the board determines there is good cause to do so.~~

(4) An interested party's notice of appeal should set forth errors of the hearing officer and the issues that will be raised on appeal.

~~(3) (5) Upon scheduling of an appeal, the board shall give to the appellant and to all other interested parties, written notice of the date, time, and place of hearing, and such notice shall be mailed to such parties at least ten (10) days prior to the date of the board's hearing.~~

~~(4) The board may, at its discretion and for good cause, continue the hearing, but in no case may the hearing be continued without review for more than sixty (60) days beyond the date originally set for hearing.~~

AUTH: 2-4-201, MCA

IMP: 2-4-201, 39-51-1109, 39-51-2404, 39-51-2407, MCA

REASON: There is reasonable necessity to amend ARM 24.7.304 to make it easier for parties to correctly file an appeal, because the existing rule fails to identify the appropriate contact information for the board. The proposed amendments also clarify that a late appeal will be considered for "good cause", as provided for in statute. The provision regarding the length of time allowed for a continuance has been moved to ARM 24.7.305. In addition, there is reasonable necessity to amend the rule to identify additional statutes that are being implemented by the rule.

24.7.305 HEARING PROCEDURE (1) Hearings The board hearing on an appeal of a hearing officer's decision shall be conducted informally, and in such manner as to ascertain the substantial rights of the parties. All issues relevant to an appeal shall be considered and passed upon. ~~Any interested party, his witness or witnesses, under oath, or affirmation, may present such evidence as may be pertinent, subject to examination by any member of the board and to cross-examination by any opposing interested parties or representative.~~

~~(2) The parties to an appeal may stipulate the facts involved orally or in writing. Such stipulation shall be approved by the board. Further hearing to take additional evidence shall be ordered, upon notice as set out in these rules, if such stipulation is found inadequate for the determination of the case.~~

~~(3) If any party to any appeal fails to appear at the board hearing and no good cause for continuance is shown, the board shall render its decision on the basis of the best evidence available to it; provided, however, a hearing before the board may be continued for good cause upon application to the board orally or in writing before the hearing is concluded, and may be continued or reopened by the board on application or on its own motion. Any party who fails to appear in person or by authorized representative at a hearing before the board may, within ten (10) days after the scheduled date of the hearing, file an application for reopening, and such application for reopening shall be granted if good cause is shown for failing to appear. An application for reopening must be in writing; it must state the reason(s) believed to constitute good cause for failing to appear at the hearing; and it must be delivered or mailed within such ten (10) day period to the board at either the local office where the appeal was filed or to the central office of the department, employment security building, corner of lockey and roberts streets, P.O. Box 1728, Helena, Montana, 59601. If an application for reopening is not allowed, a copy of such decision shall be given or mailed to each party to the appeal, and in the reopening proceedings the allowance of the application may be contested. Where it appears that an appeal, or application for leave to appeal to the board, or an application for reopening, or any other request or application may not have been filed within the period of time prescribed for filing, the appellant or applicant (as the case may be) shall be notified and be given an opportunity to show that such appeal, application or request was timely. If it is found that such appeal, application or request was not filed within the applicable time limit, it may be dismissed on such grounds. If it is found that such appeal, application, or request was timely, the matter shall be decided on the merits. Copies of a decision under this provision shall be given or mailed to all interested parties, together with a clear statement of right of appeal or judicial review.~~

~~(4) The board may, in its discretion, adjourn any hearing for a reasonable period of time, in order to secure all the evidence that is necessary and to be fair to the parties.~~

(2) The board may hear argument concerning the findings of fact and the conclusions of law reached by the hearing officer.

(3) An interested party to an appeal before the board may appear at any conference or hearing held in such appeal, either on the party's own behalf, by an attorney at law, or through an authorized lay representative as prescribed by (4).

(4) Authorized lay representatives may be permitted to appear in proceedings before the board on behalf of interested parties so long as the lay representative does not charge a fee to represent the interested party's interests and is not otherwise compensated for representation except:

(a) A claimant may be represented by a person employed by the claimant's labor union if the person's duties include handling unemployment insurance matters for the union;

(b) An employer may be represented by:

(i) an employee of the employing unit that is subject to a benefit charge or the owner of that employing unit as long as employee's or owner's typical duties include handling unemployment insurance matters for the employing unit and the employee or owner is not receiving separate remuneration; or

(ii) a person employed by a not-for-profit organization to which an employing unit pays a membership due or fee; and

(c) The department may be represented by an employee of the department.

(5) At any time prior to the issuance of the board's decision, the board may at its discretion continue a hearing in order to secure evidence or argument that is necessary and to be fair to the parties, but in no case may the hearing be continued without review for more than 60 days beyond the date originally set for hearing. In the event that a scheduled hearing is continued, the hearing shall be rescheduled with due notice to all interested parties.

AUTH: 2-4-201, MCA

IMP: 2-4-201, 39-51-1109, 39-51-2404, 39-51-2407, MCA

REASON: There is reasonable necessity to amend ARM 24.7.305 because the existing rule's procedure for "reopening" conflicts with ARM 24.7.315, as recently noted by the board. Additionally, in order for lay representatives to appear before the Board of Labor Appeals (board), it must have a policy in place. The board is attempting to balance the informal nature of the process against concerns regarding the unauthorized practice of law. In January 2007, the board enacted an interim policy on lay representation. The rule reflects the intention of the interim policy. In addition, there is reasonable necessity to amend the rule to identify additional statutes that are being implemented by the rule.

24.7.306 DETERMINATION OF APPEALS (1) The department shall transmit to the board all records that are pertinent to the appeal. The board will consider such records or portions of those records as the board deems appropriate. ~~The board will not consider any new evidence introduced at the board hearing unless good cause is shown that it was unavailable at the lower level appeal hearing.~~ As soon as possible after the hearing, the board will decide whether to reverse, modify, or affirm the decision of the ~~appeals referee~~ hearing officer. Written notice of the board's action will be mailed to all interested parties.

(2) The board will review the hearing officer's decision for errors of law or fact. In making its determination, the board will consider the record on appeal, written or oral arguments, ~~as to whether the referee erred in either law or fact~~ as well as any new evidence admitted pursuant to ~~subsection (1)~~ ARM 24.7.312.

(3) If the appealing party fails to appear at the board hearing and no good cause for continuance is shown, the board shall render its decision on the basis of the record. If the decision on appeal to the board is based on the best evidence available pursuant to ARM 24.11.320, the board may render its decision based on the best available evidence.

AUTH: 2-4-201, MCA

IMP: 2-4-201, 39-51-310, 39-51-1109, 39-51-2404, 39-51-2407, MCA

REASON: There is reasonable necessity to amend ARM 24.7.306 in order to clarify the scope of what the board considers in reaching a determination on an appeal. The board has determined that because parties increasingly appear to be unclear about the functions and role of the board, it is necessary to clarify the board's procedures. In addition, there is reasonable necessity to amend the rule to identify additional statutes that are being implemented by the rule.

24.7.312 EVIDENCE (1) The board will not consider any new evidence introduced at the board hearing unless good cause is shown that it was unavailable at the hearing before the hearing officer. If new evidence is admitted, The Board will admit relevant evidence at its hearing if it is it must be the type of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs.

~~(2) During the hearing each party shall have the right to call and examine parties and witnesses; to introduce exhibits; to question opposing parties and witnesses on any matter relevant to the issues even through that matter was not covered in the direct examination; to impeach any witness; and to offer rebuttal evidence.~~

(2) If the board finds that additional evidence is required to reach a decision, it may remand the matter to the hearing officer to conduct a hearing to obtain additional evidence in the matter. The board shall promptly notify the interested parties of such action. The hearing officer must make a new decision based on the additional evidence and the existing record.

AUTH: 2-4-201, MCA

IMP: 2-4-201, 39-51-2404, 39-51-2407, MCA

REASON: There is reasonable necessity to amend the rule because the board does not conduct the contested case proceeding. The board has determined that because parties increasingly appear to be unclear about the functions and role of the board, it is necessary to clarify the board's procedures. In addition, there is reasonable necessity to amend the rule to identify additional statutes that are being implemented by the rule.

24.7.313 OFFICIAL NOTICE (1) The board may take official notice of any generally accepted technical fact in the field of employment security, unemployment insurance procedures adopted by the Unemployment Insurance Division and determinations, rulings, orders, findings, and decisions required by law to be made by the Administrator of the Division, referees, claims examiners, and this Board.

(2) The board ~~shall~~ may take official notice of ~~those~~ matters which ~~must~~ may be judicially noticed by a court of record in the state of Montana.

(3) If official notice is taken of facts, the parties shall be so notified of any facts of which official notice is taken, and afforded an opportunity to contest the correctness of those facts.

AUTH: 2-4-201, MCA

IMP: 2-4-201, MCA

REASON: There is reasonable necessity to amend ARM 24.7.313 while the board's rules are otherwise being amended, because the existing rule contains out-dated terminology.

24.7.315 STANDARDS AND PROCEDURES FOR RECONSIDERATION OF DECISIONS (1) ~~Definitions.~~ As used in this rule, the following definitions apply:

(a) "Petition" means a petition for rehearing or reconsideration.

(b) "Requester" means the interested party requesting a petition for rehearing or reconsideration.

(2) All petitions shall be made within ten days of ~~receipt~~ the issuance of the board's decision by the requester. The requester shall serve upon all interested parties a copy of the petition.

(3) The filing of a petition is not a prerequisite for seeking judicial review of a final board decision.

(4) Petitions are addressed to the sole discretion of the board.

(5) ~~Grounds.~~ A petition will be granted only upon the following grounds:

(a) to correct clerical error;

(b) to present relevant evidence that was not known or discoverable with reasonable diligence by the requester at the time of the hearing;

(c) to present relevant evidence or argument that proper procedures ~~was~~ were not followed in appealing the matter to the board; or

(d) to present argument because good cause exists for failing to appear at the previously scheduled board hearing.

(6) ~~Contents of petition.~~ The petition must state the ground or grounds upon which reconsideration is sought and a detailed statement as to why the requested rehearing or reconsideration will likely mandate a change in the board's decision.

(7) The board shall rule upon the petition at its next regular meeting and notify the parties of its decision. In the event there is a finding of good cause to grant the petition, the hearing shall be rescheduled with due notice to all interested parties.

(8) A decision of the board denying a petition is a final decision pursuant to 39-51-2410, MCA.

AUTH: 2-4-201, MCA

IMP: 2-4-201, 39-51-1109, 39-51-2404, 39-51-2407, MCA

REASON: There is good cause to amend the existing rule in order to incorporate the "reopening" provisions of ARM 24.7.305. The board has determined that



because parties increasingly appear to be unclear about the functions and role of the board, it is necessary to clarify the board's procedures. In addition, there is reasonable necessity to amend the rule to identify additional statutes that are being implemented by the rule.

4. The proposed new rule provides as follows:

NEW RULE I INTERESTED PARTY (1) An interested party is entitled to receive notice of Board of Labor Appeals proceedings as well as a copy of the board's decision. An interested party will be given an opportunity to participate in the board's hearing on the appeal.

(a) A claimant is an interested party in an appeal of the claimant's benefits determination decision.

(b) An employer is an interested party to an appeal that is determinative of whether benefits paid to a claimant are chargeable to that employer's account.

(c) An employer is an interested party to an appeal of decision on contribution, liability, contribution rate, application for refund, subject wages, self-employment, or other contribution related issues.

(d) The department is an interested party.

(e) Any party who, upon written application to the board, is found to have a substantial interest in an issue may be deemed to be an interested party relative to the appeal.

AUTH: 2-4-201, MCA

IMP: 2-4-201, 39-51-1109, 39-51-2404, MCA

REASON: There is reasonable necessity to adopt this new rule in order to clarify who is an interested party in proceedings before the Board of Labor Appeals. The board has determined that because parties increasingly appear to be unclear about the functions and role of the board, it is necessary to clarify the board's procedures.

5. Concerned persons may present their data, views, or arguments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to: Marieke M. Beck, Agency Counsel, Office of Legal Services, Department of Labor and Industry, P.O. Box 1728, Helena, Montana 59624-1728; by facsimile to (406) 444-1394; or by e-mail to mabeck@mt.gov, and must be received no later than 5:00 p.m., July 27, 2007.

6. An electronic copy of this Notice of Public Hearing is available through the Department of Labor and Industry's (department) web site at <http://dli.mt.gov/events/calendar.asp>, under the Calendar of Events, Administrative Rules Hearings Section. The department strives to make the electronic copy of this Notice of Public Hearing conform to the official version of the Notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the Notice and the electronic version of the Notice, only the official printed text will be considered. In addition, although the department strives to keep its web site accessible at all times,

concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems, and that a person's difficulties in sending an e-mail do not excuse late submission of comments.

7. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request, which includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding all Department of Labor and Industry administrative rulemaking proceedings or other administrative proceedings. Such written request may be mailed or delivered to the Department of Labor and Industry, attention: Mark Cadwallader, 1327 Lockey Avenue, P.O. Box 1728, Helena, Montana 59624-1728, faxed to the department at (406) 444-1394, e-mailed to [mcadwallader@mt.gov](mailto:mcadwallader@mt.gov), or may be made by completing a request form at any rules hearing held by the agency.

8. The bill sponsor notice requirements of 2-4-302, MCA, do not apply.

9. The department's Hearings Bureau has been designated to preside over and conduct this hearing.

/s/ MARK CADWALLADER  
Mark Cadwallader  
Alternate Rule Reviewer

/s/ ELIZABETH BEST  
Elizabeth Best, Chair  
BOARD OF LABOR APPEALS

Certified to the Secretary of State June 11, 2007